1953

N. J. Meagher v. Uintah Gas Company et al : Supplemental Brief and Statement of Amicus Curiae

Utah Supreme Court

Civil No. 7723

IN THE SUPREME COURT of the STATE OF UTAH

N. J. MEAGHER,
Plaintiff and Respondent,

— vs. —

UINTAH GAS COMPANY and VALLEY FUEL SUPPLY COMPANY,
Defendants,

RAY PHEBUS, ASHLEY VALLEY OIL COMPANY, PAUL STOCK and JOE T. JUHAN,
Defendants and Appellants.

SUPPLEMENTAL BRIEF AND STATEMENT OF AMICUS CURIAE

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SUPPLEMENTAL BRIEF AND STATEMENT OF AMICUS CURIAE

Since filing his brief herein amicus curiae has, with his associates, devoted considerable time in the search for precedents and in reflecting on the questions involved in the failure of the lower court to conform to the mandate.

Scores of cases were found, a few of them are included herein. This supplemental brief and statement is tendered out of a sense of duty to the Court. I cannot state that there are no authorities against the position taken on the mandate feature, but I can state that in our search, which I assure the Court was diligent, we found none.

Preliminarily, amicus curiae, paraphrasing the language used in respondent's reply brief, (pps. 1 and 2) says:

1. Rehearing *is* granted when a decisive question has been overlooked by the opinion of this Court, and

2. Where a new and important principle of law is involved.

THE MANDATE.

In the original appeal (No. 6972, decision filed October 27, 1947, 185 P. 2d 747) only two questions were considered and solved by this Court:

> "(1) Does the general provision of the contract to the effect that its purpose is solely and only for the mining and operating for oil and gas contemplate exploration beyond the specific requirements of the contract to avoid its termination? and (2) Has there been an abondonment of the gas rights under the lease?"

This Court then determined that the lease had not been forfeited nor abandoned. The cause was remanded

to the lower court for proceedings to conform to the opinion.

In *Phebus et al. v. Dunford, Judge, et al.* (No. 7187, decision filed November 8, 1948, 198 P.2d 973), this Court again sets out the original mandate and says:

> "For a foundation for that direction we merely invite attention to the citation above, and the *two* questions (issues) decided therein." (Emphasis added).

From this it is shown that the mandate is specific and could have been executed and conformed to with a slight effort by the lower court.

The mandate did not grant respondent a new trial on any issue; nor did it direct a rehearing on any issue; nor were new pleadings directed or permitted. There is no uncertainty in it. No ambiguity. The two issues in the original appeal and in the mandamus proceedings had been spelled out. What could the lower court do to proceed in conformity with the opinion?

The trial judge in his memorandum decision clearly demonstrated that he must have misapprehended the meaning of the mandate. He held that it was his duty under the mandate to determine all of the rights of all of the parties under the lease A1, as modified by A5 (Mem. Dec. p. 28). The lower court holds that by the reversal of its judgment by this Court a new situation was presented. The trial judge then states:

> "The Supreme Court directed further proceedings in conformity with that situation, * * *."

Innocently enough the lower court then interprets the mandate as a direction for it:

> "* * * to determine the parties' rights under the lease. The plaintiff was compelled to accept that interpretation, and moved to have his rights, as well as the rights of the defendants thereunder, determined." (Mem. Dec. p. 28).

On page 30 of its memorandum decision, again referring to the remittitur, the lower court says that the remittitur ordered further proceedings because, it may be assumed, the "plaintiff has obtained absolutely nothing by this proceedings (sic) to date." Thereupon, at page 36 of the memorandum decision, the lower court comes to this conclusion:

> "The Court having heretofore held under the mandate of the Supreme Court, that its duty is to determine and settle the rights in the property under Al and A5, it is then necessary to determine just what interest the parties presently have under those instruments."

Commencing on page 52 of the memorandum decision the lower court proceeds to outline a decree which is ordered entered.

> "* * * prescribing, defining and adjudicating the rights of the parties to this action in and to the 480 acres of land in issue * * *."

Then it is that the lower court adjudicates and determines all of the rights under all of the exhibits in

favor of and against (1) the plaintiff, N. J. Meagher, (2) defendant Ashley Valley Oil Company, (3) defendant Ray Phebus, (4) defendant Paul Stock, (5) defendant Joe T. Juhan, (6) defendant Valley Fuel Supply Company, and (7) defendant Uintah Gas Company.

On second appeal the opinion states:

> "Since our former decision, three claims were allowed to be brought into the case:"
>
> 1) By amendment Meagher asserted claim to an oil royalty assigned in 1930 to Stock and Phebus. 2) By counterclaim Stock asserted a one-half interest in the operating rights to the 440 acres. 3) By amended reply Meagher claimed that one-half interest. See Op. par. 2.

The record shows Stock's counterclaim came *after* Meagher's amended reply. The sequence in the opinion misleads the reader.

The lower court also awarded operating rights in the N. 40 to Meagher, which this Court awarded to Ashley Valley Oil Company (with modification).

The case was again remanded:

> " * * * with instructions to modify the conclusions of law and judgment to conform to this decision, * * *."

Mistakenly, the lower court had wholly disregarded the terms of the first mandate.

> "The decision of the lower court is reversed,

and the case remanded to that court for proceedings to conform to this opinion."

The lower court, of course, had no jurisdiction to allow the three new claims to be brought into the case nor had it jurisdiction to award to Meagher or Ashley Valley Oil Company the N. 40. Disregarding its jurisdiction limitations, it sought to and did litigate all of the issues between all of the parties growing out of lease A1 as modified by A5.

Nothing demonstrates more clearly the utter failure of the lower court to follow the mandate than the "Statement of Points" found in Respondent's Answer to Petition for Rehearing, p. a. It is there asserted that nine new decisions were made—*correctly made.*

When this Court entered its judgment in the first appeal the "Hour of Decision" had passed. Presently we are not concerned whether these decisions were made correctly or incorrectly. The error lies in making them. They were not made in conformity with the opinion and judgment of this Court in the first appeal. Neither were the three new claims allowed to be brought in within the terms of that mandate. Nor, under the mandate, could the lower court award the N. 40 to Meagher or to Ashley Valley Oil Company. In vain we search the mandate for authority or instruction for either.

The mandate of the first decision and the mandate of the second decision are substantially the same. The lower court could have conformed to the first mandate

as it is now instructed to conform to the second mandate. If the lower court treats the second mandate as it did the first mandate, the end of nine years of wearisome litigation is not yet in sight.

It is becoming clearer and clearer that everything done by the lower court after remittitur should be vacated, set aside and held for naught.

In *Frye v. King County,* 289 P. 18 (Wash.) the court says:

> "The mandate of this court is binding on the superior court, and must be strictly followed. Having reversed the judgment and remanded the case to the trial court, with instructions to enter judgment in accordance with our opinion, that order is conclusive and no judgment different therefrom can be entered by the trial court. Volume 2, p. 89. R.C.L."

In *McClung v. Harris,* 65 P. 941 (Okla.), the court says:

> "When the mandate from this court reached the court below, the plaintiff presented an amended petition, setting up facts which occurred prior to the trial of the original case appealed to this court, and asked leave to file the same, and to be permitted to litigate the additional matter set up in such amended petition. The plaintiff's application to amend was denied, and from this order and the judgment entered by the district court pursuant to the mandate from this court plaintiff appeals, and the defendant in error moves the dismissal of such appeal.

> "In our judgment, the motion should be sustained. It was the duty of the plaintiff to plead all of the facts which would afford him any relief in the case when it was tried the first time in the court below. This court took the record as it found it, and from that record the defendant was clearly entitled to the relief granted, and, under the facts disclosed by the case-made, in equity and under the authorities, no other judgment should have been rendered. The trial court, under the mandate, had no discretion in the premises, * * *."

Some authorities hold that the function of the lower court, after mandate, is merely ministerial. See *Kimpton v. Jubilee Mining Company,* 55 P. 918 (Mont.); *Woodward v. Perkins,* 171 P.2d 997 (Mont.); *Columbia Mining Company v. Holter,* 1 (Mont.) 429, where the court said:

> "The mandate was the imperative command of the supervisory court to a subordinate court. The court below was powerless to disobey."

The parties are not entitled to introduce, and the court to which the cause has been remanded has no authority to entertain, new issues. *Illinois* v. *Illinois Central Railroad Company,* 184 U.S. 77, 46 L. ed. 440.

> "The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal

See also Powerine Co. v. Zion's Sav. Bank & Trust Co., 106 Utah 384, 148 P.2d 807 and Forbes v. Butler, 73 Utah 522, 275 P. 772.

A QUESTION OF SUBSTANCE OR OF JURISDICTION MAY BE RAISED BY THIS COURT *SUA SPONTE*.

(A) By amicus curiae.

Morrow v. *Morrow*, 156 P. 2d 827 (Nev.):

"Defendant insists that the amicus curiae was without authority to make the motion to dismiss the appeal. Our consideration of this contention satisfies us that he was competent to make it. The order appointing him because of the important question involved, did not limit him exclusively to advising the court as to that question, as defendant contends. We are likewise satisfied, after examining the record, together with the evidence introduced by the amicus curiae on the hearing of the motion that the appeal should be dismissed.

"First, as to the competency of the movent, it has been held in this and other jurisdictions that it is within the province of an attorney as an amicus curiae, to move to dismiss an action on the ground that it is collusive or fictitious. Haley v. Eureka County Bank, 21 Nev. 127, 26 P. 64, 12 L.R.A. 815; Muskogee Gas, etc., Co. v. Haskell, 38 Okl. 358, 132 P. 1098, Ann. Cas. 1915A, 190; Ward v. Alsup, 100 Tenn. 619, 46 S.W. 573; Judson v. Flushing Jockey Club, 14 Misc. 350, 36 N.Y.S. 126, 128; 2 Am. Jur. pp. 681-2, sec. 6. In the Nevada case, Haley v. Eureka County Bank, supra, the court held that an attorney as amicus curiae may move to dismiss an

all of the facts which would afford him any relief in the case when it was tried the first time in the court below. This court took the record as it found it, and from that record the defendant was clearly entitled to the relief granted, and, under the facts disclosed by the case-made, in equity and under the authorities, no other judgment should have been rendered. The trial court, under the mandate, had no discretion in the premises, * * *."

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for error apparent, or intermeddle with it, further than to settle so much as has been remanded."

A QUESTION OF SUBSTANCE OR OF JURISDICTION MAY BE RAISED BY THIS COURT *SUA SPONTE*.

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"First, as to the competency of the movent, it has been held in this and other jurisdictions that it is within the province of an attorney as an amicus curiae, to move to dismiss an action on the ground that it is collusive or fictitious. Haley v. Eureka County Bank, 21 Nev. 127, 26 P. 64, 12 L.R.A. 815; Muskogee Gas, etc., Co. v. Haskell, 38 Okl. 358, 132 P. 1098, Ann. Cas. 1915A, 190; Ward v. Alsup, 100 Tenn. 619, 46 S.W. 573; Judson v. Flushing Jockey Club, 14 Misc. 350, 36 N.Y.S. 126, 128; 2 Am. Jur. pp. 681-2, sec. 6. In the Nevada case, Haley v. Eureka County Bank, supra, the court held that an attorney as amicus curiae may move to dismiss an

action as collusive. The court said (21 Nev. 127, 26 P. 68):

> 'It is not only the right, but the duty, of an attorney of the court, if he knows or has reason to believe that the time of the court is being taken up by the trial of a feigned issue, to so inform the judge thereof; and it is discretionary with the court to stay proceedings, make due inquiry, and, if the facts warrant the suggestion, then dismiss the case.'"

(B) By the Court sua sponte.

Hardy v. *Meadows,* 71 Utah 255, 264 P. 968.

> "But matters of substance or of subject-matter jurisdiction may not be waived. These need neither objection, exception, nor assignments of error. With respect to them courts, sua sponte, open the record and take notice of defects of substance and of subject-matter jurisdiction without regard to the wishes of either party named on the record."

In *Lewis* v. *Cocks,* 23 Wall. 466, 23 L. ed. 70, where there was lack of jurisdiction, the court said:

> "In the present case the objection was not made by demurrer, plea or answer, nor was it suggested by counsel; nevertheless if it clearly exists it is the duty of the court *sua sponte* to recognize and give it effect."

THE STOCK PAPER.

The bargain made by Jacob with Esau would not be condoned by this Court.

Esau knew that by the very terms of that bargain he could never enjoy his inheritance. A court of justice knows otherwise. The bargain lacked adequacy of consideration. So also was it coercive.

For an accommodation Stock gave a paper to Meagher. Meagher asked for the paper to quiet title. He then used it to show forfeiture and abandonment. He now claims the paper to reap for himself a sum of money in excess of $700,000.00.

The hardship is so flagrant, the misadventure so in doubt, the oppression so apparent, the deal so unconscionable as to appall the Court and outrage the feelings of men seeking to do and receive right. Cordoza once said:

> "When all is said and done justice is the synonym of an aspiration, a mood of exultation, a yearning for what is fine or high."

When Esau did not perish Jacob should have returned the inheritance. When the Stock paper was found to be so valuable the slightest tinge of morality would have dictated its prompt return. Respondent has this dubious satisfaction "* * * nevertheless, being crafty, I caught you with guile." 2 Cor. 12:16.

Because a decisive question has been overlooked and because an error has been made with respect to an

important principle of law, the writer firmly believes that a rehearing should be granted.

Respectfully submitted,

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